BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NO. 2000-527-C - ORDER NO. 2001-079

JANUARY 30, 2001

IN RE:	Petition of AT&T Communications of the Southern States, Inc. for Arbitration of Certain Terms and Conditions of a Proposed Interconnection Agreement with BellSouth Telecommunications, Inc. Pursuant to 47 U.S.C. Section 252.	))))))	ORDER ON ARBITRATION

I. INTRODUCTION

This matter comes before the Public Service Commission of South Carolina ("Commission") on the Petition of AT&T Communications of the Southern States, Inc. ("AT&T") for arbitration of certain terms and conditions of a proposed Interconnection Agreement by and between AT&T and BellSouth Telecommunications, Inc. ("BellSouth"). The Petition was filed pursuant to the provisions of Section 252 of the Telecommunications Act of 1996 ("1996 Act").

On October 18, 2000, AT&T filed its Petition with the Commission requesting the Commission to resolve a number of outstanding issues with BellSouth arising out of the parties' interconnection negotiations. AT&T's Petition set forth twenty-six unresolved issues. On November 13, 2000, BellSouth filed its Response to the Petition. Thereafter the Commission established a schedule and proceeding for arbitration.[1]

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[1] *See* Commission Order No. 2000-944, dated November 21, 2000.

Negotiations between the parties continued after the filing of the Petition. At the time the scheduling order required the filing of testimony, only four open issues remained for arbitration. For the remaining issues, the parties were able to settle, defer to a generic proceeding, or agreed to resume negotiations at a later date. The Commission is also informed that AT&T withdrew several of the issues at this time with leave to renew negotiations or arbitration proceedings when a business need arises.

Pursuant to the scheduling order, the parties filed testimony setting forth the four outstanding issues to be arbitrated by the Commission. AT&T prefiled the direct testimony and rebuttal testimony of Mr. Gregory R. Follensbee, Director in AT&T's Law & Government Affairs organization. BellSouth prefiled the direct testimony and surrebuttal testimony of Mr. John A. Ruscilli, Senior Director for State Regulatory for the nine-state BellSouth region.

An arbitration proceeding was held by the Commission on Friday, January 12, 2001, at 10:30 a.m., in the Commission's hearing room. The Honorable William Saunders, Chairman, presided. AT&T was represented by Francis P. Mood, Esquire, and Gene V. Coke, Esquire. BellSouth was represented by Caroline N. Watson, Esquire, William F. Austin, Esquire, and R. Douglas Lackey, Esquire. AT&T presented Mr. Follensbee as its witness, and BellSouth presented Mr. Ruscilli as its witness. Following the hearing, both parties filed with the Commission briefs and proposed orders addressing the issues presented at the hearing.

II. LEGAL STANDARDS AND PROCESSES FOR ARBITRATIONS UNDER THE 1996 ACT

The 1996 Act provides that parties negotiating an interconnection agreement have the duty to negotiate in good faith.[2] After negotiations have continued for a specified period, the 1996 Act allows either party to petition a state commission for arbitration of unresolved issues.[3] The petition must identify the issues resulting from the negotiations that are resolved, as well as those that are unresolved.[4] The petitioning party must submit along with its petition "all relevant documentation concerning: (1) the unresolved issues; (2) the position of each of the parties with respect to those issues; and (3) any other issues discussed and resolved by the parties."[5] A non-petitioning party to a negotiation under this section may respond to the other party's petition and provide such additional information as it wishes within 25 days after the state commission receives the petition.[6] The 1996 Act limits a state commission's consideration of any petition (and any response thereto) to the unresolved issues set forth in the petition and the response.[7]

Through the arbitration process, the Commission must now resolve the four remaining disputed issues in a manner that ensures the requirements of Sections 251 and 252 of the 1996 Act are met. The obligations contained in those sections of the 1996 Act are the obligations that form the basis for negotiation, and if negotiations are unsuccessful, those sections then form the basis for arbitration. Once the Commission

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[2] 47 U.S.C. § 251(c)(1).
[3] 47 U.S.C. § 251(b)(2).
[4] *See generally,* 47 U.S.C. §§ 252(b)(2)(A) and 252(b)(4).
[5] 47 U.S.C. § 252(b)(2).
[6] 47 U.S.C. § 252(b)(3).
[7] 47 U.S.C. § 252(b)(4).

provides guidance on the unresolved issues, the parties will incorporate those resolutions into a final agreement that will then be submitted to the Commission for its final approval.[8]

III. STATEMENT OF THE ISSUES

The four remaining issues[9] presented by the parties in the arbitration proceeding are:

Issue 1: Should calls to internet service providers ("ISPs") be treated as local traffic for purposes of reciprocal compensation?

Issue 6: Under what rates, terms, and conditions may AT&T purchase network elements or combinations to replace service currently purchased from BellSouth tariffs?

Issue 7: How should AT&T and BellSouth interconnect their networks in order to originate and complete calls to end users?

Issue 9: Should AT&T be permitted to charge tandem rate elements when its switch serves a geographic area comparable to that servicing BellSouth's tandem switch?

IV. DISCUSSION OF THE ISSUES

Issue 1: Should calls to Internet service providers (ISPs) be treated as local traffic for the purposes of reciprocal compensation?

AT&T's Position:

ISP calls should be treated as local traffic for purposes of reciprocal compensation. AT&T believes, based upon the traditional "caller pays" practice, that

[8] 47 U.S.C. § 252(e)
[9] The issues are identified by the original number as the issue appeared in AT&T's Petition.

BellSouth is obligated to pay AT&T for completing these calls, just as BellSouth is obligated to pay AT&T for completing all other local calls.

BellSouth's Position:

The SCPSC previously ruled in the BellSouth/ITC^DeltaCom arbitration that ISP traffic is not local and, therefore, not subject to the payment of reciprocal compensation. Further, the FCC has determined that ISP traffic is interstate in nature. Therefore, such traffic should not be treated as local traffic for purposes of reciprocal compensation.

Discussion:

This Commission has previously ruled that reciprocal compensation should not apply to ISP-bound traffic. In Order No. 1999-690, Docket No. 1999-259-C, dated October 4, 1999 (ITC^DeltaCom/BellSouth arbitration), this Commission stated:

> The Commission finds that ISP-bound traffic is non-local interstate traffic. As such, the Commission finds on a going-forward basis and for the purposes of this interconnection agreement that ISP-bound traffic is not subject to the reciprocal compensation obligations of the 1996 Act.
> (Order at page 66)

This Commission's decision in that previous arbitration was correct. Based on the 1996 Act and the FCC's Local Competition First Report and Order issued August 8, 1996 ("Local Competition Order"), reciprocal compensation obligations under Section 251(b)(5) apply only to local traffic. Local telecommunications traffic is defined by FCC rule as traffic that "originates and terminates within a local service area established by the

state commission."[10] ISP-bound traffic, as AT&T witness Mr. Follensbee demonstrated during this hearing, may originate in Columbia, South Carolina, but terminates somewhere on the World Wide Web. The majority of ISP-bound calls terminate outside of the local calling area in which the call originates, and usually terminate outside of the state. Indeed, because the majority of ISP-bound traffic is interstate traffic, this traffic is subject to the FCC's jurisdiction. The FCC has exercised its jurisdiction over ISP-bound traffic by exempting such traffic from access charges.

AT&T does not dispute that the traffic in question is jurisdictionally interstate. Mr. Follensbee pointed out during his testimony that AT&T agrees with BellSouth's assertions and this Commission's previous findings that this traffic is interstate in nature. Mr. Follensbee's entire argument that this Commission should reverse its prior decision was based on his argument that the FCC has not ruled yet on intercarrier compensation and that the Commission is free to decide the issue either way until the FCC decides to act. Mr. Follensbee asserted that this Commission should step in and fill the void the FCC has left because otherwise, AT&T and other CLECs will not be compensated for delivering calls to ISPs that originate on BellSouth's network.

Mr. Ruscilli, BellSouth's witness, testified that BellSouth is the only party that receives no specific identifiable compensation as a result of CLECs furnishing services to ISPs. Specifically, ISPs sell services to people who are generally BellSouth's subscribers. Those subscribers pay the ISP for access to the ISP's services and pay

[10] CFR § 51.701 (b)(1).

BellSouth for a basic line[11]. The ISP in turn buys facilities from AT&T and presumably pays AT&T for those services. When a BellSouth subscriber then places a call that transits AT&T's and the ISP's networks, both AT&T and the ISP are being compensated. BellSouth receives only the basic rate the subscriber pays for his or her telephone service. If these calls were not exempted from access charges by the FCC and were rated as the access calls that they actually are, then BellSouth would receive originating access for these calls.

AT&T argues that the same use is made of BellSouth's network whether a BellSouth end user originates a call to an AT&T ISP or to an AT&T end user. While it is true that the same local loop is used, and the call passes through the same switch, that is also true of intrastate or interstate toll calls that the subscriber makes. However, as the record demonstrates, the characteristics of the calls are entirely different. The average local call is very short, while the average call that transits an ISP is often quite long, which means that the two calls have entirely different cost characteristics. The Commission concludes that the fact that each type of call uses the same loop and switch is no reason to allow AT&T to recover reciprocal compensation for a call that in most cases is an interstate call, a fact admitted by AT&T.

While the Commission is aware that many states have found reciprocal compensation due on ISP traffic, the Commission's decision is consistent with other commissions which have considered this issue. Massachusetts, for instance, has

[11] The evidence presented by Mr. Ruscilli demonstrated that 88 percent of BellSouth's local lines are subscribed to basic local exchange, as opposed to LATA wide, services.

recognized that the unqualified payment of reciprocal compensation for ISP-bound traffic is actually antithetical to real competition. The Massachusetts Department of Telecommunications and Energy, in reversing its earlier decision ordering the payment of reciprocal compensation, explained its reasoning as follows:

> The unqualified payment of reciprocal compensation for ISP-bound traffic, implicit in our October Order's construing of the 1996 Act, does not promote real competition in telecommunications. Rather, it enriches competitive local exchange carriers, Internet service providers, and Internet users at the expense of telephone customers or shareholders. This is done under the guise of what purports to be competition, but is really just an unintended arbitrage opportunity derived from regulations that were designed to promote real competition. A loophole, in a word ... But regulatory policy ... ought not to create such loopholes or, once having recognized their effects, ought not to leave them open.
> Real competition is more than just shifting dollars from one person's pocket to another's.

The Massachusetts Commission further held:

> And it is even more than the mere act of some customers' choosing between contending carriers. Real competition is not an outcome in itself – it is a means to an end. The "end" in this case is economic efficiency ... Failure by an economic regulatory agency to insist on true competition and economic efficiency in the use of society's resources is tantamount to countenancing and, to some degree, encouraging waste of those resources. Clearly, continuing to *require* payment of reciprocal compensation ... is not an opportunity to promote the general welfare. It is an opportunity only to promote the welfare of CLECs, ISPs, and their customers, at the expense of Bell Atlantic's telephone customers and shareholders.

(Complaint of MCI WorldCom, Inc. Against New England Telephone and Telegraph Company d/b/a Bell Atlantic – Massachusetts for Breach of Interconnection Terms

Entered Into Under Section 251 and 252 of the Telecommunications Act of 1996, Docket No. 97-116-C, Order, May 1999).

Similarly, the Board of Public Utilities for the State of New Jersey, in its decision made in its case, In the Matter of the Petition of Global NAPS, Inc. for Arbitration of Interconnection Rates, Terms, Conditions and related Arrangements with Bell Atlantic-New Jersey, Inc., Pursuant to Section 252 (b) of the Telecommunications Act of 1996, Docket No. T098070426, decided July 12, 1999, concluded that: "ISP-bound traffic, as determined by the FCC, is interstate in character, and, therefore, in the Board's view, is not entitled to reciprocal compensation."

Of course, in BellSouth's region, Mr. Follensbee stated that Florida had reached differing conclusions, finding in some cases that this traffic was local and in others it was not. Mr. Ruscilli noted that the Louisiana Commission in a complaint proceeding determined that no compensation was due for traffic that transited an ISP location. Specifically, in Docket No. U-23839 - In Re: Petition of KMC Telecom, Inc. Against BST to Enforce Reciprocal Compensation Provisions of the Parties' Interconnection Agreement, decided October 13, 1999, the Louisiana Commission was faced with a complaint by KMC in which KMC argued that BellSouth owed reciprocal compensation to KMC for traffic that transited an ISP location. In rejecting KMC's position, the Louisiana Commission stated in relevant part that:

> The *Declaratory Ruling* provides no support for KMC's claim; the FCC stated expressly that "the communications at issue here do not terminate at the ISP's local server, as CLECs and ISPs contend, but continue to the ultimate destination or destinations, specifically at a Internet website that is often located in another state." *Declaratory Ruling*,

> ¶12. As further support for the finding that a call has only one point of termination, the FCC recognized that its "conclusion that ISP-bound traffic is largely interstate might cause some state commissions to re-examine their conclusion that reciprocal compensation is due to the extent that those conclusions are based on a finding that this traffic terminates at an ISP server..." Id. ¶27. Emphasis added. Thus, it cannot be seriously argued that ISP traffic has more than one point of termination or that it actually does terminate locally at the ISP server, even though the FCC has stated emphatically that it does not.

Interestingly, one of the more recent cases involving this issue was decided in Colorado, where that commission had evidently previously decided that reciprocal compensation was due for calls that transited an ISP provider. On May 3, 2000, the Colorado Commission issued its initial decision in a case, In the Matter of the Petition of Sprint Communications Company, L.P. for Arbitration Pursuant to U.S. Code § 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with U.S. West Communications, Inc., Docket No. 00B-011T, Decision No. C00-479, in which it stated:

> Given that most Internet calls end at locations out of state, it appears that such calls are primarily interstate in nature. We view the originator of the Internet-bound call as acting primarily as a customer of the ISP, not as a customer of U S WEST. Both U S WEST and Sprint are providing access-like functions to transmit the call to the Internet, similar to what their role would be in providing access to an IXC to transmit an interstate call. Furthermore, the remote hubs to which Internet-bound traffic is directed are often outside the state in which the call originated. Beyond that, the ultimate destination of these calls is some web site, which is generally in another state or even another country.

As a result, the Colorado Commission decided that reciprocal compensation should not be paid for such traffic. In support of its logic, the Colorado Commission explained:

> While ISP calls appear to be interstate in nature, our conclusion is not necessarily based upon that determination. Even if this traffic were considered to be local in nature, the Commission still would not embrace reciprocal compensation with a positive rate. Such a scheme would, in our view, bestow upon Sprint an unwarranted property right, the exercise of which would result in decidedly one-sided compensation. In addition, we find that reciprocal compensation would introduce a series of unwanted distortions into the market. These include: (1) cross-subsidization of CLECs, ISPs, and Internet users by the ILEC's customers who do not use the Internet; (2) excessive use of the Internet; (3) excessive entry into the market by CLECs specializing in ISP traffic mainly for the purpose of receiving compensation from the ILECs; and (4) disincentives for CLECs to offer either residential service or advanced services themselves. In short, we agree with U S WEST that reciprocal compensation for ISP traffic would not improve overall social welfare; it would simply promote the welfare of some at the expense of others. See, *Complaint of MCI Worldcom, Inc against New England Telephone and Telegraph Co.,* D.T.E. 97-116-C Order (Mass. Dept. of Telecommunications and Energy May 1999) ("[T]he benefits gained through this regulatory distortion by CLECs, ISPs and their customers do not make society as a whole better off, because they come artificially at the expense of others."). (footnote omitted)

Based upon the discussion above, this Commission finds its decision in the ITC^DeltaCom/BellSouth arbitration to be correct. In the record before this Commission in the instant arbitration, AT&T agrees that the traffic in question is interstate, not local. This traffic does not originate and terminate in the same local service area under any viable theory that has been advanced in this case. As the Massachusetts and Colorado

Commissions have so clearly stated, the conclusion that AT&T wants this Commission to reach is not in the public interest and in fact creates disincentives for CLECs to offer residential or advanced services themselves. AT&T has advanced no reason for the Commission to change its position that traffic transiting an ISP is interstate non-local traffic that is not subject to reciprocal compensation. Accordingly, the Commission will maintain its position that ISP bound traffic is non-local interstate traffic which is not subject to the reciprocal compensation obligations of the 1996 Act.

Based upon the forgoing analysis and in resolution of this issue, the Commission approves the language proposed by BellSouth for inclusion in the Interconnection Agreement:

Issue 6: Under what rates, terms, and conditions may AT&T purchase network elements or combinations to replace service currently purchased from BellSouth tariffs?

With regard to Issue 6, there only remains one point of disagreement between the parties. That point of disagreement concerns the application of termination liability charges when existing services that are being provided to AT&T under term and volume contract are converted to unbundled network elements ("UNEs").

AT&T's Position:

AT&T proposes that it should not be assessed any cancellation charges when requesting to convert services originally purchased from BellSouth's tariffs to network elements. AT&T asserts that it originally purchased these tariffed services because BellSouth was unwilling to provide combinations of network elements in lieu of special access.

BellSouth's Position:

BellSouth states that it is willing to convert existing services under either month-to-month contract or volume and term contracts to the appropriate pre-existing combination of UNEs upon request. However, BellSouth also takes the position that if the service is currently provided under a contractual agreement, then the terms of the retail agreement or contract that are applicable to early termination, including the payment of early termination liabilities, must be satisfied.

Discussion:

This issue involves the situation where AT&T has purchased a tariffed service from BellSouth under a volume or term contract, and AT&T wants to convert that tariffed service to UNEs. BellSouth acknowledges that the conversion itself is not a problem. BellSouth agrees that it will convert pre-existing combinations to UNE rates at AT&T's request. However, BellSouth insists that AT&T must pay the termination charges that are provided for in the contract. BellSouth argues that AT&T has generally paid lower rates under the contract than it would have paid under normal month-to-month charges. In exchange for those favorable rates, BellSouth asserts that AT&T agreed to pay termination liabilities in the event the contract is terminated early.

AT&T takes the position that no termination liabilities should be applied. AT&T asserts that at the time that it entered the contracts that the contracts were its only available option. When the Commission issued Order No. 97-189 (Docket No. 96-358-C)

(the "Initial Agreement")[12], the Commission believed that BellSouth was not required to provide combinations of network elements in lieu of special access. Thus, AT&T contends that, as a CLEC, it utilized the only option available to it, the purchase of wholesale tariffed services.

It is now clear from court decisions and FCC orders that AT&T is entitled to purchase unbundled elements and combinations thereof.[13] AT&T informs the Commission that BellSouth is attempting to impose early termination charges on AT&T if it converts from purchasing under the BellSouth tariff to the purchase of unbundled network elements and combinations. AT&T contends that this action constitutes a large and unjustified penalty, which under the circumstances is not appropriate. AT&T points out that it is not terminating its relationship with BellSouth but is merely seeking to change how the services are billed, i.e. converted to a UNE combination rate structure.

BellSouth asserts that it entered into an agreement with AT&T, based on BellSouth's existing tariffs, and charged AT&T less than AT&T would have ordinarily paid due to AT&T's assurances that it would take the specified volume of services or the services for the specified term. BellSouth asserts that the Commission should not, and cannot alter or otherwise impair, the obligations of agreements between BellSouth and AT&T.

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[12] The initial interconnection agreement between AT&T and BellSouth was approved by the Commission on March 10, 1997, by Order No. 97-189, Docket No. 96-358-C. The term of the Initial agreement was three years, and it expired on June 2, 2000.

[13] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, 4th FNOPR (UNE Remand), CC Docket No. 96-98, FCC 99-2389 (Rel. Nov. 5, 1999); In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Third Report and Order, 4th FNOPR (UNE Remand), CC Docket No. 96-98, FCC 99-370 (rel. Nov. 24, 1999); and In the Matter of Implementation of the Local Competition Provisions of the

In consideration of this issue, the Commission recognizes that AT&T entered into the contract with BellSouth for the provision of these services after this Commission in approving the Initial Agreement provided that BellSouth was not required to provide the combinations of network elements in lieu of special access. While the Commission believes that other avenues, such as month-to-month contracts or the purchase of UNEs with AT&T recombining the UNEs, were available to AT&T other than entering the term and volume contracts, it is obvious that AT&T made the most practical choice and perhaps the best business choice available to it. Regardless, the choices available to AT&T at the time were limited due to this Commission's conclusion that BellSouth was not required to provide the combinations of network elements in lieu of special access, a conclusion that subsequently was shown to be in error.

Clearly, court decisions and FCC decisions since the time of the Initial Agreement have provided that combinations and conversions must be provided. The U.S. Supreme Court decision in January 2000 upheld the FCC's rules and order which required ILECs to provide combinations of network elements. In the FCC's Supplemental Order to its Third Report and Order, the FCC allowed for conversions as long as the requesting carrier was providing a "significant amount of local exchange service."[14] Further, that FCC Order did not require the payment of any additional rates or charges for conversions such as the termination charges provision proposed by BellSouth.

Telecommunications Act of 1996, Third Report and Order, 5th FNOPR (UNE Remand), Supplemental Clarification, CC Docket No. 96-98, FCC 00-183 (Rel. June 2, 2000).

[14] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order, FCC Docket No. 99-370, CC Docket No. 96-98, November 24, 1999.

Accordingly, the Commission concludes that AT&T should not be subject to termination penalties for converting special access purchased under tariffed services pursuant to contracts to network elements. In reaching this decision, the Commission notes that the loop/transport combination sought by AT&T would continue to serve the same purpose, have the same features, perform the same functions, and service the exact same customer. The Commission finds that AT&T should not be penalized by BellSouth's refusal, pursuant to this Commission's directive, to provide AT&T with the loop/transport combinations prior to the U.S. Supreme Court's decision in January 2000, upholding the FCC's rules and order requiring ILECs to provide combinations of network elements. Further, the Commission believes that this result comports with the FCC's Supplemental Order to its Third Report and Order that allows for conversions as long as the requesting carrier was providing a significant amount of local exchange service.[15]

As to BellSouth's assertion that this Commission has no authority to alter or impair the provisions of its contracts, this Commission is aware that under South Carolina law the right to contract is not absolute but is subject to the state's police powers.[16] In this matter before the Commission, the Commission finds this issue to be a matter involving the public interest. The 1996 Act is designed to foster competition in local and long distance telephone markets. The local competition provisions of the 1996 Act require ILECs to allow other local exchange carriers access to the incumbent carrier's networks and services to enable the competing carriers to compete in providing local telephone

[15] In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Supplemental Order, FCC Docket No. 99-370, CC Docket No. 96-98, November 24, 1999.
[16] *See Anchor Point, Inc. v. Shoals Sewer Company,* 308 S.C. 422, 418 S.E.2d 546 (1992).

services.[17] As the Commission is acting in furtherance of the public interest, specifically to promote and foster the competition envisioned by the 1996 Act, the Commission under the state's police powers may provide for the conversion of the special access under tariffed conditions to combinations.

This Commission will not allow contravention of the clear intent of allowing conversions by the charging of termination penalties. By converting special access services to unbundled network elements, AT&T will be able to serve customers more economically. This in turn should allow AT&T to compete with BellSouth, and with other competitive carriers, in the marketplace.

Therefore, the Commission approves the language proposed by AT&T for inclusion in the Interconnection Agreement.

Issue 7: How should AT&T and BellSouth interconnect their networks in order to originate and complete calls to end users?

AT&T's Position:

The responsibility for originating, transporting, and terminating traffic should be mutual and each party should be financially responsible for transporting its own originating traffic to a comparable point on the terminating party's network. AT&T, and all CLECs, should be permitted to choose the most efficient interconnection point. CLECs should not have to design their networks less efficiently, and their customers should not shoulder the burden of higher costs because BellSouth refuses to transport its own originating traffic.

[17] *See* 47 U.S.C. § 251(c)(2) and § 251(c)(3).

BellSouth's Position:

BellSouth agrees that AT&T can choose to interconnect with BellSouth's network at any technically feasible point in the LATA. However, BellSouth does not agree that AT&T can impose upon BellSouth the financial burden of delivering BellSouth's originating local traffic to that single point. If AT&T requires BellSouth to haul BellSouth originating traffic from the originating local calling area to a point of interconnection outside the local calling area, AT&T should compensate BellSouth for the additional transport costs.

Discussion:

This issue requires a determination of whether AT&T or BellSouth is going to be financially responsible for certain facilities needed to carry local traffic from a BellSouth local calling area to a distant Point of Interconnection ("POI") established by AT&T. The calls that utilize the facilities in question are calls that originate in one BellSouth local calling area and are intended to be completed in that same local calling area but that have to be routed out of that local calling area because of AT&T's network design.

This issue exists because AT&T and BellSouth have each built and intend to utilize totally separate and different networks for the provision of local service in South Carolina. Each carrier's local networks were designed to be the most efficient and cost-effective for that carrier. BellSouth's system consists of a number of local networks that have developed over time, and each BellSouth local network is generally characterized by the use of multiple local switches and relatively short loops to serve its customers in a given local calling area. AT&T intends to use fewer switches and longer loops to serve its

customers. The result is that, while BellSouth has numerous switches in South Carolina, AT&T has only two switches, both located in Columbia.[18]

The record reveals that AT&T intends to have, at most, two points in each LATA where AT&T's networks and BellSouth's networks interconnect with each other. As the testimony demonstrated, BellSouth and AT&T have no dispute when a call originates on BellSouth's network in the local calling area where the POI is located and is destined for an AT&T customer who is also located in the local calling area where the POI is located. The dispute between AT&T and BellSouth arises when a call originates on BellSouth's network in a local calling area outside the local calling area where the POI is located. AT&T and BellSouth cannot agree on who should pay for the facilities necessary to get from BellSouth's customer in one local calling area to AT&T's POI in another local calling area. BellSouth asserts that these facilities are the responsibility of AT&T. Conversely, AT&T maintains that BellSouth is responsible for collecting all of the originating BellSouth local traffic, wherever that may be, and transporting that traffic at no cost to AT&T to AT&T's POI.

There are several matters related to this issue that are undisputed and that should be noted. First, it is undisputed that in order for a customer of one of the parties here, either BellSouth or AT&T, to call a customer of the other, the two networks have to be interconnected. Moreover, it is also undisputed that a CLEC, in this case AT&T, can choose to interconnect with BellSouth's network at any technically feasible point. Section 251(c)(2) of the 1996 Act imposes a duty on ILECs "to provide, for the facilities and

[18] AT&T also has a switch located in Charlotte, North Carolina that it intends to use to serve customers in

equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network … for the transmission and routing of telephone exchange service and exchange access."[19] Further, interconnection must be provided "at any technically feasible point within the carrier's network."[20] Thus if AT&T chooses to have a single POI within the LATA, it can do so.

BellSouth also does not dispute that AT&T may determine its own local calling area for its subscribers. AT&T's local calling area is not implicated in this issue. Instead, this issue only involves facilities that are used to carry traffic between BellSouth subscribers in a BellSouth local calling area and AT&T's POI that is located in a different BellSouth local calling area in the LATA. AT&T is free to designate its own local calling area for calls originated by its subscribers. If AT&T wishes to designate the entire Columbia LATA as the local calling area for its customers located in the Columbia area, that is AT&T's prerogative. AT&T can collect calls from its customers in Bamberg, for instance, switch them in Columbia, where AT&T has its switches, and then hand them off to BellSouth at the BellSouth tandem in Columbia for completion anywhere in the LATA. None of this is in dispute. The dispute centers solely on identifying the party that will be financially responsible for the facilities necessary to haul a call to a distant AT&T POI when the call originates with a BellSouth end user and is destined for an AT&T end user located in the same local calling area.

It would be convenient to point to a statute or to an FCC order or rule that resolves this issue, but the matter is not that clear. Both parties agree that, as a matter of

law, AT&T is entitled to interconnect where it wants and to deliver its originated traffic to BellSouth at that point. In fact, AT&T, in its brief and proposed order, cites to numerous decisions which stand for the proposition that a CLEC may interconnect at only a single point in each LATA. In support of its position, BellSouth cites to the FCC's *Local Interconnection Order* where MCI, in a proceeding at the FCC, attempted to get the FCC to declare that both the incumbent local exchange company and the competitive local exchange company had to declare a single point of interconnection on each other's network where its originating traffic would be delivered. See In re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, August 8, 1996 (*Local Interconnection Order.*) ¶ 214. The FCC refused, leaving it to negotiation and arbitration to resolve the issue. However, neither party has been able to cite to a single decision that addresses the precise issue before this Commission in the instant proceeding. Therefore, this Commission is essentially left to resolve this matter based on the evidence presented and the Commission's own sense of equity and fair play.

AT&T suggests that the Commission resolve this issue by imposing "equivalent interconnection" obligations on both AT&T and BellSouth. While this sounds fair, AT&T also insists that the 1996 Act gives it the exclusive right to determine where and how many times AT&T and BellSouth's networks will be interconnected in a single LATA. Mr. Ruscilli essentially summarizes AT&T's position as requiring the following: (1) each party's interconnection points (i.e., where it receives traffic for termination)

[19] 47 U.S.C § 251(c)(2)(A).

should be situated at the "top" of its network; (2) each party should have an equal number of interconnection points; and (3) each party is responsible for delivering its interconnection traffic to the other party's interconnection points. AT&T's support for urging this Commission to adopt these principles revolves around repeated claims that to do so would be "fair and equitable." AT&T also asserts that its position has been adopted by several state commissions.

The Commission finds, however, that adopting AT&T's "principles" would be neither fair nor equitable. Presumably, AT&T has chosen the most economical way for it to provide local service in South Carolina. It has a total of three switches "serving" South Carolina, two in Columbia and one in Charlotte, North Carolina. Indeed, while it is not absolutely clear based on Mr. Follensbee's testimony, it seems that these switches were generally the toll switches AT&T already had in South Carolina and North Carolina which were modified to handle local traffic. AT&T, understandably, has made every effort to minimize its costs to provide local service in South Carolina. AT&T's network design is a matter best left to AT&T. However, it would be neither equitable nor fair for this Commission to permit AT&T to shift costs to BellSouth as a result of that network design.

The central theme, embedded in AT&T's principles of "equivalent interconnection," is that the carrier terminating the traffic gets to determine where the originating carrier will deliver the traffic. This is the practical impact of allowing AT&T

[20] 47 U.S.C § 251(c)(2)(B).

to designate the number of points of interconnection and requiring BellSouth to be financially responsible for delivering calls to those points of interconnection.

Our review of the FCC's orders does not suggest that a CLEC is free to transfer the costs incurred by its interconnection choices onto the ILEC. In the *Local Competition Order* the FCC specifically stated that "a requesting carrier that wishes a 'technically feasible' but expensive interconnection would, pursuant to section 252(d)(1), be required to bear the cost of that interconnection, including a reasonable profit."[21]

Part of AT&T's argument is that adopting BellSouth's proposal would force AT&T to build facilities to every BellSouth local calling area, and would waste valuable and limited collocation space. That is absolutely inaccurate. As noted earlier, BellSouth acknowledges that AT&T can establish a physical point of interconnection with BellSouth at any technically feasible point, and if AT&T chooses to have only a single such point in a LATA, that is AT&T's choice. AT&T can, however, lease facilities from BellSouth or any other entity to collect traffic from local calling areas outside of the local calling area in which its POI is found. Nothing in BellSouth's proposed solution to this issue would require AT&T to build facilities devoted to local service in South Carolina beyond that required to establish a single point of interconnection in each LATA that AT&T chooses to serve.

Indeed, when viewing the equities of the situation, it is clear that BellSouth's position that AT&T should be financially responsible for these facilities is the equitable position. AT&T presently interconnects with almost every end office and certainly every

[21] *Local Competition Order* ¶ 199.

access tandem in BellSouth's territory. Nevertheless, it has elected to build only a single, or at the most two, points of interconnection in each LATA. The result, if AT&T prevails on this issue, is that AT&T will have succeeded in requiring BellSouth to subsidize AT&T's entry into the local exchange market in South Carolina. As additional AT&T traffic is routed over these facilities, then BellSouth is responsible for maintaining sufficient facilities to meet acceptable service quality levels. AT&T should be responsible for its portion of the traffic utilizing the facilities. Requiring AT&T to pay for the costs of its interconnection choices to offset the costs imposed by those interconnection choices on BellSouth is the fair and equitable solution. AT&T's interconnection choices requires the transport of local calls from one local calling area to another local calling area where AT&T's POI is located. As AT&T has contributed to the need and costs of these facilities, AT&T should pay for use of the facilities.

Section 252(d)(1) requires that the incumbent be allowed to recover the added costs created by a CLEC's "expensive interconnection."[22] To allow the ILEC to recover these added costs is the only equitable solution. Otherwise, a CLEC could select a POI that is more expensive in the aggregate simply because the CLEC need not take into account the costs that it avoids because the costs are transferred to the ILEC. The fair and equitable solution is to require a CLEC to bear the fair share of the costs of its interconnection choices, and the fair share of costs should take into account all costs resulting from those choices. Such a solution is consistent with the FCC which stated "because competing carriers usually compensate incumbent LECs for the additional costs

[22] *Local Competition Order* ¶ 199.

incurred by providing interconnection, competitors have an incentive to make economically efficient decisions about where to interconnect."[23]

AT&T also asserts that the FCC has addressed this issue directly in *TSR Wireless, LLC, et al., v. U.S. West.*[24] In this case, several paging carriers alleged that US West and other ILECs had improperly imposed charges for facilities used to deliver LEC-originated traffic. The paging carriers based their complaint on 47 C.F.R. § 51.703(b) and sought an order from the FCC prohibiting the ILECs from charging for dedicated and shared transmission facilities used to deliver LEC-originated traffic. AT&T cites to the FCC Order where the FCC determined that "any LEC efforts to continue charging [the paging carriers] or other carriers for delivery of such [LEC-originated] traffic would be unjust and unreasonable."[25] AT&T also cites to the FCC Order where the FCC concluded that FCC "rules prohibit [the ILECs] from charging for facilities used to deliver LEC-originated traffic [to the paging carriers.]"[26] What AT&T omits from its analysis is that portion of the FCC Order where the FCC determined that its rules required LECs to deliver, without charge, traffic to CMRS[27] providers anywhere within the local calling area or Major Trading Area ("MTA") in the case of CMRSs, in which the call originated. The FCC also stated that LECs are required "to deliver, without charge, traffic to CMRS

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[23] *Local Competition Order* ¶ 209; *see also Iowa Utilities Board v. FCC,* 120 F.3d 753, 810 (8th Cir. 1997) ("Although economic concerns are not to be considered in determining if a point of interconnection ... is technically feasible, the costs of such interconnection ... will be taken into account when determining the just and reasonable rates, terms, and conditions for these services"), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utilities Board,* 525 U.S. 366 (1999), *decision on remand, Iowa Utilities Board v. FCC,* 219 F.3d 744 (8th Cir.), *petitions for cert. pending,* Nos. 00-511, 00-555,00-587, 00-590, & 00-602 (U.S. 2000).

[24] *TRS Wireless v. U.S. West, et al.,* Memorandum and Order, FCC 00-194 (Rel. June 21, 2000).

[25] *Id.* at ¶ 29.

[26] *Id.* at ¶ 25.

[27] Commercial Mobile Radio Service.

providers anywhere within the MTA in which the call originated, with the exception of RBOCs, which are generally prohibited from delivering traffic across LATA boundaries."[28] The MTA as discussed in the *TRS Order* is the wireless carrier's equivalent of a local service area. The FCC did not say in the *TRS Order* that LECs were required to deliver calls to CMRS providers to points outside the MTA in which the call originated, but rather that the LECs only had to deliver that traffic at no charge within the MTA or local calling area where the call originated.

The Commission finds that the *TRS Order* does not stand for the proposition that AT&T asserts. Instead, the Commission believes that a more appropriate application of the reasoning of the *TRS Order* to the present issue is that BellSouth should not be required to deliver free of charge its local traffic outside the local service area in which the call originates. As noted previously, there is no dispute for traffic that originates in the local calling area where AT&T's POI is located. In that situation, that traffic is not delivered outside the local calling area where the call originated. As was the result in the *TRS Order* where the FCC did not require the LECs to deliver free of charge local traffic to CMRS providers to points outside the MTA, which is the CMRS providers' local calling area, neither should BellSouth be required to deliver local traffic free of charge to points outside the local calling area where the call originates.

AT&T's position presents another interesting dilemma that bears some consideration. BellSouth's position, obviously, is that its network is made up of a number of local networks. AT&T's position is that once it interconnects with BellSouth

[28] *TRS Order*, ¶ 31.

at any point, that is all it needs to do to be able to exchange local traffic anywhere in the LATA. In evaluating AT&T's position, the Commission is mindful of what may happen when BellSouth obtains interLATA relief and the LATA boundaries evaporate. Applying AT&T's proposed principles, AT&T could then assert, since the barrier posed by the LATA boundaries no longer exists, that BellSouth should deliver all of its traffic originating in South Carolina directly to one of AT&T's switches in New York. This is nothing more than a logical extension of the argument AT&T makes here. AT&T could designate a point near one of its switches in New York as the interconnection point for Bamberg local traffic. If AT&T's position were accepted, BellSouth could be required to haul a call from one of its subscribers in Bamberg that is destined to the AT&T subscriber next door all the way to New York, so that AT&T could switch the call and then haul it back to Bamberg. Such a scenario clearly is not equitable. This is particularly true since AT&T presented no evidence that it built any facilities to provide local service in South Carolina. The Commission declines to approve a concept that could result in BellSouth being required to haul local calls hundreds of miles, just because AT&T does not want to make the investment in South Carolina.

AT&T argues that BellSouth has been hauling its originating traffic to a single point in each LATA under the parties' existing contract. However, as Mr. Ruscilli points out in his surrebuttal testimony, the contract that the parties are currently operating under is a "first generation" contract. One of the reasons that this arbitration is taking place is that both AT&T and BellSouth want to change, in different ways, the agreement that controls the way they do business together. At the time the original contract was made,

no one anticipated that AT&T, or the other CLECs would try to serve entire LATAs with a single switch or that they would expect BellSouth to haul its local traffic all over the LATA. The fact that BellSouth has done so under its first contract with AT&T, however, is not justification for continuing that practice, now that the parties have experience in this area and can more fully appreciate the actual ramification caused by CLECs' network designs.

In resolving this issue, the Commission concludes that while AT&T can have a single POI in a LATA if it chooses, AT&T shall remain responsible to pay for the facilities necessary to carry calls from distant local calling areas to that single POI. That is the fair and equitable result.

Accordingly, the Commission adopts the position of BellSouth on this issue and approves the contract language proposed by BellSouth for inclusion in the Interconnection Agreement.

Issue 9: Should AT&T be permitted to charge tandem rate elements when its switch serves a geographic area comparable to that servicing BellSouth's tandem switch?

AT&T's Position:

When AT&T's switches serve a geographic area comparable to that served by BellSouth's tandem switches, then AT&T should be permitted to charge tandem rate elements.

BellSouth's Position:

In order for AT&T to appropriately charge for tandem switching, AT&T must demonstrate to the Commission that (1) its switches serve a comparable geographic area

to that served by BellSouth's tandem switches and that (2) its switches actually perform local tandem functions.

Discussion:

This issue is also driven in large part by the network design AT&T has chosen to utilize, as described in the discussion of Issue 7 above. BellSouth's local network generally consists of local tandem switches, end office switches and interoffice transport. However, AT&T's local network generally consists of a single switch and long loops connecting the switch to AT&T's subscribers. When BellSouth routes a call from a CLEC through one of BellSouth's tandems, BellSouth completes the call by first switching the call at the tandem, transporting the call to the appropriate local end office, and finally switching the call to the intended recipient of the call. BellSouth then charges the originating CLEC reciprocal compensation based on the appropriate tandem switching rate, transport rate and local switching rate, since all of these parts of BellSouth's network were used in transporting and terminating the call.

On the other hand, when BellSouth hands off one of its calls to AT&T, AT&T carries the call back to its end office switch, where the call is switched once and then placed on the appropriate loop to reach the intended recipient of the call. That is, because of AT&T's network design, the call is only switched once and there are no interoffice transport facilities involved. AT&T, as previously noted, has chosen this design because it is cheaper for it to build long loops rather than to build switches.

Nevertheless, and in spite of the fact that only one switch is involved, AT&T wants BellSouth to pay reciprocal compensation to AT&T for calls placed from

BellSouth's local subscribers to AT&T's local subscribers at a rate equal to the total of the tandem switching rate and the end office switching rate for every such call AT&T handles. BellSouth objects, for obvious reasons, and that frames the dispute raised by this issue.

AT&T's position is based on a narrow reading of the language of a portion of FCC Rule 47 C.F.R. §51.711 (a), and specifically sub-section 3, which provides "Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate."

BellSouth's position is that the determination of whether AT&T is entitled to the tandem switching rate plus the end office switching rate is a factual one determined by a two-pronged test. The first prong is as AT&T states it and involves the geographic coverage of the switch. The second prong, however, requires an examination of whether the switch actually performs tandem switching functions with regard to local traffic. BellSouth's position that the switch must function as a tandem switch is based both on the FCC's Local Interconnection Order, which addressed this matter, and an earlier section of the same rule that AT&T relies on to support its position. Specifically, Section (a)(1) of Rule 51.711 provides:

> For purposes of this subpart, symmetrical rates are rates that a carrier other than an incumbent LEC assesses upon an incumbent LEC for transport and termination of local telecommunications traffic equal to those that the incumbent LEC assesses upon the other carrier for the same services. (Emphasis Added)

Further, in its Local Competition Order, at Paragraph 1090 where it discussed this subject, the FCC directed state commissions to "consider whether new technologies (e.g., fiber ring or wireless network) performed functions similar to those performed by an incumbent LEC's tandem switch and thus whether some or all calls terminating on the new entrant's network should be priced the same as the sum of transport and termination via the incumbent LEC's tandem switch." (Emphasis added). That is, the FCC included, in addition to the issue of geographic coverage, a requirement that the switch in question performs functions similar to that of a tandem switch in order to entitle the CLEC to reimbursement at a rate that normally would involve two or more switches, not one.

Therefore, in order to resolve this issue, the Commission must first determine which test should apply, and then review the facts presented to see if the test is met. BellSouth asserts that the two-pronged test must apply, but that in either event, AT&T has not demonstrated that it meets either the geographic coverage test or the functionality test.

AT&T's argument that the test is only a single-pronged one rests solely on the fact that a portion of the FCC's rule touching on this issue, 47 C.F.R. § 51.711(a)(3), only mentioned the matter of similar geographic coverage. However, a review of some cases supports the two-pronged test.

Specifically, in MCI Telecommunications Corp. v. Illinois Bell Telephone, 1999 U.S. Dist. LEXIS 11418 (N.D. Ill, June 22, 1999), the district court, in addressing this very issue, noted:

> In deciding whether MCI was entitled to the tandem interconnection rate, the ICC applied a test promulgated by the FCC to determine whether MCI's single switch in Bensonville, Illinois, performed functions similar to, and served a geographical area comparable with, an Ameritech tandem switch.

In the accompanying footnote, the court stated:

> MCI contends the Supreme Court's decision in IUB affects resolution of the tandem interconnection rate dispute. It does not. IUB upheld the FCC's pricing regulations, including the 'functionality/geography' test. (citation omitted) MCI admits that the ICC used this test....Nevertheless, in its supplemental brief, MCI recharacterizes its attack on the ICC decision, contending the ICC applied the wrong test...But there is no real dispute that the ICC applied the functionality/geography test; the dispute centers around whether the ICC reached the proper conclusion under that test.

Similarly, the Ninth Circuit Court of Appeals viewed the rule in the same way in U.S. West Communications v. MFS Intelenet, Inc., 193 F.3d 1112, 1124 (9th Cir. 1999), finding that:

> The Commission properly considered whether MFS's switch performs similar functions and serves a geographic area comparable to US West's tandem switch.

Therefore, based upon the FCC's *Local Competition Order* ¶ 1090, 47 C.F.R. § 51.711(a)(1) and (3), and the guidance of the above-cited cases, this Commission finds that the test to use in determining whether charges for tandem rate elements is appropriate is a two-prong test analyzing both geographic coverage and functionality. Clearly, the geographic coverage prong is contained in 47 C.F.R. § 51.711(a)(3) and in the *Local Competition Order* ¶ 1090. But 47 C.F.R. § 51.711(a)(1) and the *Local Competition Order* at ¶ 1090 also expressly provides for the second prong of the test, or the

consideration of functions. To read ¶ 1090 of the *Local Competition Order* as only advancing the geographic test ignores the instructions of the FCC that:

> states may establish transport and termination rates in the arbitration process that vary according to whether traffic is routed through a tandem switch or directly to an end-office switch. In such event, states shall also consider whether new technologies (*e.g.*, fiber ring or wireless networks) perform functions similar to those perform by an incumbent LEC's tandem switch.

Thus, it is appropriate to use the two-prong test in determining whether charges for tandem rate elements are appropriate.

The first question then is whether AT&T's switches are comparable in geographic scope to BellSouth's tandem switch. In support of geographic scope, AT&T through its witness Mr. Follensbe offered two transparency maps to compare the service areas of AT&T and BellSouth. As demonstrated by Mr. Follensbee, when the maps are overlaid, the service area of AT&T is actually larger in South Carolina than the service area of BellSouth. BellSouth asserts that in order to qualify for the tandem switching rate, AT&T's switches must actually be serving the same geographic area as do BellSouth's tandem switches. In BellSouth's view, it is not sufficient that the switches simply be capable of serving customers in the geographic area but that AT&T must actually serve customers in those areas.

The Commission cannot agree with BellSouth's position that AT&T's switches must actually serve customers to qualify for tandem switching rates. We find no requirement in the FCC rules or order that require a CLEC to actually serve a given number of customers in any relevant area. The number of customers being served is

irrelevant. It is sufficient under the geographic prong of the test that AT&T demonstrate that its switches serve a certain geographic area, not that it serves a certain threshold of customers. Thus, the Commission finds that AT&T has demonstrated that its switches serve a geographic area comparable to that covered by BellSouth's tandem switches.

The second prong of the test is whether AT&T's switches perform functions similar to BellSouth's tandem switches. It is clear that they do not. The FCC's rule defines "local tandem switching capability" as including "trunk connect facilities," the basic switch trunk function of connecting trunks to trunks and the functions that are centralized in tandem switches, including but not limited to call recording, routing of calls to operator services and signaling conversion features. 47 C.F.R. § 51.319(c)(3). This means that AT&T's switches must connect trunks terminated in one end office switch to trunks terminated in another end office switch. Since AT&T's switches in South Carolina do not connect in such a manner, they cannot be found to perform tandem switch functions.

The Commission concludes that in order to qualify for the tandem switching rate, an AT&T switch must serve a geographic area comparable to that served by BellSouth's tandem and the switches must perform the functions of a tandem switch for local traffic. The Commission concludes that AT&T has not satisfied the second prong of this test in this proceeding.

Therefore, the Commission adopts the position of BellSouth with regard to this issue and directs that the Interconnection Agreement should reflect BellSouth's position.

IT IS THEREFORE ORDERED THAT:

1. ISP-bound traffic is non-local interstate traffic and is therefore not subject to reciprocal compensation. Accordingly, BellSouth's proposed contract language is appropriate and shall be included in the Interconnection Agreement.

2. AT&T is not subject to termination penalties for converting special access purchased under tariffed services pursuant to contracts for network elements. Accordingly, AT&T's proposed contract language on this issue shall be included in the Interconnection Agreement.

3. AT&T is entitled to a single Point of Interconnection in a LATA, however, AT&T shall remain responsible for paying for the facilities necessary to carry calls to the single Point of Interconnection. Accordingly, the language proposed by BellSouth with regard to this issue shall be included in the Interconnection Agreement.

4. To qualify for tandem switching rate, an AT&T switch must serve a geographic area comparable to the geographic area served by BellSouth's tandems and must perform the function of a tandem switch for local transfer. Based on the discussion above related to this issue, the Commission approves the language proposed by BellSouth for inclusion in the Interconnection Agreement.

5. This Order is enforceable against AT&T and BellSouth. BellSouth affiliates which are not incumbent local exchange carriers are not bound by this Order. Similarly, AT&T affiliates are not bound by this Order. This Commission cannot force contractual terms upon a BellSouth or AT&T affiliate which is not bound by the 1996 Act.

6. This Order shall remain in full force and effect until further Order of the Commission.

BY ORDER OF THE COMMISSION:

Chairman

ATTEST:

Executive Director
(SEAL)